No. 69
(Consolidated with No. 71)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, BROTHERHOOD OF RAILROAD TRAINMEN, ORDER OF RAILROAD CONDUCTORS AND BRAKEMEN, and SWITCHMEN'S UNION OF NORTH AMERICA ..... *Appellants*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, THE KANSAS CITY SOUTHERN RAILWAY COMPANY, MISSOURI PACIFIC RAILROAD COMPANY, ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, and THE TEXAS AND PACIFIC RAILWAY COMPANY ..... *Appellees*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF ARKANSAS

REPLY BRIEF FOR THE APPELLANTS

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ARGUMENT

I. THE CONTENTION THAT PUBLIC LAW 88-108 PREEMPTS PERMANENTLY IS DIRECTLY CONTRARY TO ITS LANGUAGE AND WITHOUT FOUNDATION.

The railroads contend that Public Law 88-108 *permanently* supersedes full crew laws.[1] This argument was dis-

[1]Brief for Appellees, 56-67.

cussed to some degree in the principal briefs for the brotherhoods[3] and the State of Arkansas,[3] but deserves further analysis as the contorted extremity of the railroad effort to bypass congressional power—past and future.

The language of the resolution is unambiguous. Under Section 4, "The award shall continue in full force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."[4] R. 77. Under Section 8, "This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence." R. 78.

The direct statements of the statute are reconfirmed by the legislative history.[5] The Senate committee reported:

> Under the terms of the resolution, the arbitration award would be binding for no more than 2 years, unless the parties mutually agree to a different period. The committee has imposed this limitation in harmony with the President's recommendation, in order to closely limit the scope and impact of the resolution.

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[3]Brief for the Appellants (No. 69), 29-30, n. 17 (and see cases cited therein). This discussion does not imply, of course, a concession of pre-emption for any period of time.

[3]Brief for Appellants (No. 70), 26-30.

[4]There has been no agreement, other than to extend the duration of the award to March 31, 1966. See Brief for Appellees, 56-57.

[5]The temporal limitation relates, *inter alia*, to congressional reluctance to act at all. See Brief for the Appellants (No. 69), 28-31. "[The resolution] is what is purports to be—a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." S. Rep. No. 459, 88th Cong., 1st Sess., 7 (1963). Such peril, the railroads need to be reminded, was a strike growing out of a specific bargaining impasse, not "make work practices" (Brief for Appellees, 34, n. 11) or "featherbedding" of any dimension.

S. Rep. No. 459, 88th Cong., 1st Sess., 10 (1963). The House committee concurred. H.R. Rep. No. 713, 88th Cong., 1st Sess., 14, 15 (1963).

The arbitrators had no difficulty understanding the metes of their authority. Their statement of duration repeated congressional terminology. "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." R. 95. The neutral members of the panel noted:

> In approaching our task we have been fully aware of the handicaps imposed upon us not only by our relative unfamiliarity with the complex problems of railroad operation but also by the narrow time limits within which we have been compelled by the Joint Resolution to complete our work. . . . The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small.

R. 98-99.

But reliance on language too clear for misunderstanding, the railroads maintain, "amounts to little more than a play on words." Brief for Appellees, 59. Support for this startling proposition, it is argued, must be adduced from "the general interests to be served by the legislation," as distinguished from the words used by the legislators.

The device which the railroads contrive to give color to negation of congressional language on the duration of the award is a relationship between Public Law 88-108 and the Railway Labor Act, described as "integration," "keying in," or "pouring into a mold."[6] But reference to the

[6] On less expansive occasions, the railroads appear to concede that only the "procedural framework" or the "mechanics" of the Railway Labor Act are involved. Brief for Appellees, 44, 60. Further, mere inclusion within the scheme of federal labor law does not impel total preemption if the legislative history of the particular portion is to the contrary. *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

Railway Labor Act in Public Law 88-108 is confined to the simplest mechanics of procedure. R. 77. There is more allusion to the Department of Labor and other executive agencies than Railway Labor Act operation. *E.g.*, preamble, Sections 3, 6, 7. R. 76-78.

All expressions of intent make it clear that an *ad hoc* board free of the strictures of *any* established "scheme" embodies the legislative will. Congress chose an "independent" "new and separate board" to handle the dispute. S. Rep. No. 459, 88th Cong., 1st Sess., 9.

The import—if not the intent—of a contrary contention undermines future as well as past congressional decisions. The 1965 Senate hearings on the effect of Public Law 88-108 are cited repeatedly by the railroads.[7] *E.g.*, Brief for Appellees, 41, 50, 63. These hearings have been held to examine the effect of the 1963 resolution so that Congress can determine whether or not future action, such as an extension of the award, is advisable. But responsibility for the future which Congress evidently accepts is rendered nugatory under the railroad contention about the permanence of the award.

Here again, the railroads ask this Court to thwart legislative operation. They persuaded Congress to enact Public Law 88-108 by arguing that its effect would not be too severe because of state full crew laws.[8] Congress limited its action temporally because of its reluctance to act at all. The railroads *now* say Congress was deceived—the full crew laws are preempted and the award does not expire in two

[7] Innuendoes about the refusal of congressional witnesses to comment on the outcome of pending litigation (Brief for Appellees, 50, 56-57) cannot suggest support for any position. See, *e.g.*, Canon No. 20, *Canons of Professional Ethics*, American Bar Assn. (1963). And surely the railroads are not serious in suggesting that sums such as $1,425 afford "vacation with pay" for more than two years. See Brief for Appellees, 66-67.

[8] See Brief for the Appellants (No. 69), 24.

years. This position represents only cavalier disregard for the integrity of the legislative process.[9]

II. As to the Commerce Clause Contention, the Absence of Any Evidence on the Actual Operation of the Arkansas Full Crew Laws Compels the Unanimous Conclusion of the Court Below That There Are Genuine Issues of Material Fact.

A unanimous court below held that there are genuine issues of material fact which bar disposal of the commerce clause contention under the motion for summary judgment on which this case now turns. R. 239, 279. The railroads continue to dispute this conclusion,[10] although there is no record on the actual operation of the Arkansas full crew laws.

Conceding that trial is necessary on the allegation that full crew laws impermissibly "burden" interstate commerce, the railroads assert impermissible "discrimination" as a matter of law. If there is ground for summary disposition of any commerce clause contention, it would be dismissal.

> While the full train crew laws undoubtedly placed an added financial burden on the railroads in order to serve a local interest, they did not obstruct interstate transportation or seriously impede it.

Southern Pac. Co. v. *Arizona*, 325 U.S. 761, 782 (1945). See *Chicago, R. I. & Pac. Ry.* v. *Arkansas*, 219 U.S. 453 (1911).

The fine distinction which the railroads seek to draw between burdening and discriminating against interstate commerce is questionably viable for the regulation challenged at bar. The discrimination terminology occurs traditionally in tax cases. *E.g., Robbins* v. *Taxing District of*

[9] And, if a colloquialism may be excused, this is a classic effort by the railroads "to have their cake and eat it too."

[10] Brief for Appellees, 77-83.

Shelby County, 120 U.S. 489 (1887); *Best & Co.* v. *Maxwell*, 311 U.S. 454 (1940).

In the most analogous single case in recent decisions of this Court, *Florida Lime Growers* v. *Paul*,[11] 373 U.S. 132 (1963), one issue was whether or not a state statute in "application unreasonably burdened or discriminated against interstate" activity. 373 U.S. at 135. After overruling preemption arguments, the Court remanded the case for trial, holding "that the effect of the statute on interstate commerce cannot be determined on the record now before us." 373 U.S. at 137. *Florida Lime Growers* confirms the conclusion of the court below that commerce clause contentions generally must be supported by a factual record.

The railroads admit that on the face of the Arkansas statutes interstate commerce is not treated discriminatorily and that their coverage and exceptions do not coincide with the inter-intrastate dichotomy (Brief of Appellees, 16, 78, 79), but quote *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-56 (1940):

> The commerce clause forbids discrimination, whether forthright or ingenious. *In each case* it is our duty to determine whether the statute under attack, whatever its name may be, will *in its practical operation* work discrimination against interstate commerce.

(Emphasis added.) The practical operation of the Arkansas full crew laws are not determinable from the summary record below.[12]

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[11]It is significant that the railroads totally ignore the *Florida Lime Growers* decision, although it is discussed at length by appellants and the court below, and deals comprehensively with the contention that different minimum standards in state and federal legislation denotes conflict compelling preemption. See Brief for Appellees, 29-32.

[12]In assumptive response to the elaborate assumptions of the railroads (Brief for Appellees, 79-81), it might be, for example, that carriers with longer total trackage regularly carry substances with substantially higher danger potential to the communities through which they pass than do short lines, necessitating greater safety precautions. Ability to pay also may be a factor; it is urged by the appellee railroads themselves. *E.g.*, R. 13.

III. The Only Materiality for Repeated Cataloguing of a Trend Toward Repeal of Full Crew Laws is Illustration of Permissible Legislative Action, Not Support for Judicial Invalidation.

The railroads describe in redundant detail the undeniable recent diminution of full crew laws through ordinary state legislative processes. Brief for Appellees, 15, 56, 57, 58, 74.

This is a curious contention. Candidly, the brotherhoods are unable to imagine any support for the legal position of the railroads which such development affords, and can only guess that its repetition is designed to convince the Court of the obsolescence of the full crew laws themselves.[13]

Such approach characterizes the entire railroad argument. They say, for example, that specific legislative history should be ignored because of broad policy factors—and that such factors are the merits of full crew laws.

But the merits of the statutes are not at issue here. To the contrary, full crew laws have been considered exhaustively by state and federal legislative bodies,[14] and "the clash of fact and opinion should be resolved by the democratic process and not the judicial sword." *International Bro. of Teamsters* v. *Hanke*, 339 U.S. 470, 478 (1950). The success of the railroads in persuading legislatures to repeal full crew laws illustrates only the process by which the issue should be resolved; the exclusiveness of such process is

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[13]See Brief for the Appellants (No. 69), 35-42.

[14]The Arkansas railroad safety chapter was considered again by the state legislature in its 1965 session. A statute forbidding the placing of freight cars at the rear of passenger trains was repealed, Ark. Stat. Ann. § 73-730 (Supp. 1965), but the full crew laws were retained.

al to the position of the brotherhoods and the function of the judiciary.

spectfully submitted,

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